88-1761

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GERALD T. SMITH,
Petitioner,

vs.

MARGARET VAN DUYN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where no violation of petitioner's constitutional rights has been presented, should not this Court decline review?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Margaret Van Duyn respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the Illinois Supreme Court, entered in this proceeding February 1, 1989, denying petitioner's petition for appeal as a matter of right or leave to appeal from the final judgment of the Appellate Court, Third District. The opinion of the Illinois Appellate Court, Third District, is reported at 173 Ill.App.3d 523, 527 N.E.2d 1005.

STATEMENT OF THE CASE

Respondent hereby incorporates by reference the statement of facts contained in the opinion of the Appellate Court of Illinois, Third District (Pet. A-2, A-3, A-4), noting further only that whereas respondent's count for intentional infliction of severe emotional distress alleges a series of acts, respondent's libel counts addressed solely the alleged defamatory statements of fact contained in the two posters.

With respect to the procedural history of the proceeding below as proffered by petitioner, respondent notes that after the Appellate Court of Illinois, Third District, filed its opinion, the petitioner filed a Petition for Rehearing, which was denied on September 20, 1988. (Resp. A-1).

Contained in petitioner's STATEMENT OF THE CASE is the following statement:

> Nevertheless, in analyzing the dismissal of Respondent's Second Amended Count I (alleging intentional infliction of severe emotional distriess), the Appellate Court did not respond to Petitioner's claim of First Amendment privilege for liability from intentional infliction of severe emotional distress. (Pet. 5).

Petitioner's assertion is erroneous. Petitioner maintained in the proceeding below before the Appellate Court of Illinois, Third District, that this Court's decision in *Hustler Magazine v. Falwell,* 485 U.S. ____, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), controlled the resolution of this issue. (Pet. A-11) As set forth in respondent's REASONS WHY THE PETITION SHOULD BE DENIED, *Hustler Magazine* stands for the proposition that, with respect to public figures and public officials, there is a First Amendment opinion privilege from liabilty for intentional infliction of severe emotional distress when the gravamen of the distress claim is defamation.

The Appellate Court of Illinois, Third District, rejected petitioner's contention that this Court's decision in *Hustler Magazine* controlled the resolution of this issue on two independent grounds. The first reason was that the gravamen of the respondent's emotional distress claim in this case is not speech:

> First, *Hustler Magazine* concerned the publication of an ad parody as the sole basis for respondent's claim of severe emotional distress. Although arguably the two posters at issue in the present case can be compared to the ad parody in *Hustler Magazine,* defendant in the present case did much more than distribute posters. Therefore, even if the posters in the present case can be considered privileged speech under the First Amendment and excluded under the holding of *Hustler Magazine,* defendant has committed other tortious acts for which we can find no constitutional privilege. Such acts warrant our consideration whether a jury could find that defendant's conduct was outrageous beyond the bounds of decency. (Pet. A-11).

The second independent basis for distinguishing the opinion below of the Illinois Appellate Court from this Court's decision in *Hustler Magazine* was that the former involves a private figure whereas the latter concerned a public figure. (Pet. A-12, A-13)

REASONS FOR DENYING THE WRIT

I. The petition for a writ of certiorari should be denied since when the gravamen of a cause of action for intentional infliction of severe emotional distress is non-speech conduct, such as in the proceeding below, the inclusion of an ancillary component of opinion does not present a violation of petitioner's constitutional rights.

The petition for a writ of certiorari should be denied because the gravamen of respondent's cause of action against petitioner for intentional infliction of severe emotional distress is non-speech conduct. Thus, this case does not present any constitutional issue deserving review.

Petitioner's contention to the contrary is premised upon the accuracy of his characterization of the opinion of the Illinois Appellate Court, Third District, in this proceeding:

> The reinstatement of Respondent's claim [for intentional infliction of severe emotional distress] permits imposition of liability on Petitioner even though he has done nothing more than insist on his legal, constitutional right of free speech. (Pet. 9-10)

This is an inaccurate characterization of petitioner's underlying conduct.

As the Illinois Appellate Court noted in its opinion, "defendant in the present case did much more than distribute posters." (Pet. A-11) Indeed, respondent alleges a systematic course of outrageous predominantly non-speech conduct by petitioner intended to cause her severe emotional distress and to make her quit her job. The Illinois Appellate Court stated:

> If the only alleged actions were the contents and distribution of the two posters, we would be inclined to affirm the trial court's dismissal. However, the distribution of the posters is just the last in a series of events that has

> spanned a two year period. We find it particularly bothersome that defendant, a seemingly well-educated person, would stoop to following, in his car, plaintiff while she was driving her car and to confronting plaintiff at the airport and preventing her ingress and egress. We believe this type of behavior, compounded with the other acts alleged, is worthy of a jury's consideration whether defendant is liable for the intentional infliction of emotional distress. Although we acknowledge that plaintiff has a position in a highly controversial enterprise, we consider defendant's acts are subject to being viewed as directed at plaintiff personally, not the subject matter of plaintiff's occupation. (Pet. A-14)

The First Amendment does not proscribe liability for conduct which happens to include an ancillary speech component. For, "not all speech is of equal First Amendment importance." *Hustler Magazine v. Falwell,* 99 L.Ed.2d 41, 52 (1988). Clearly, speech is an ingredient in most human conduct. Alleged conduct that satisfies the exacting elements of the tort of emotional distress, if the gravamen thereof is non-speech conduct, may subject a defendant to possible liability even if speech is an ancillary component. See e.g., *Bowersox v. P.H. Glatfelter Co.,* 677 F.Supp. 307, 311-12 (M.D.Pa. 1988); *Vietnamese Fishermen's Association v. Knights of Ku Klux Klan,* 518 F.Supp. 993, 1001-06, 1013 (S.D.Tex. 1981) (outrageousness element present); *Molko v. Holy Spirit Association,* 252 Cal.Rptr. 122, 762 P.2d 46, 61-62 (Cal. 1988); *Lagies v. Copley,* 168 Cal.Rptr. 368, 378 (Cal.App. 1980). See also *Brown v. Loudoun Golf and Country Club, Inc.,* 573 F.Supp. 399 404-05 (E.D.Va. 1983); *Cromley v. Board of Education of Lockport,* 699 F.Supp. 1283, 1285-87, 1300 (N.D.Ill. 1988); *McGrath v. Fahey,* 126 Ill.2d 78, 533 N.E.2d 806, 811-12 (Ill. 1988); *Miller v. Linden,* 172 Ill.App.3d 594, 527 N.E.2d 47, 49-50 (Ill.App. 2d Dist. 1988).

The viability of the aforesaid emotional distress claims reflects an incidental regulation on speech to allow for the protection of an independent, tangible, and identifiable governmental interest. See *United States v. O'Brien,* 391 U.S. 367 (1968).

The Appellate Court of Illinois recognized in its opinion that the petitioner's underlying systematic, coercive, and physically intrusive non-speech conduct constitutes the gravamen of the emotional distress claim. (Pet. A-11, A-14) Rather than attempting to persuade the respondent to quit her job merely through the power of ideas, petitioner resorted primarily to the impermissible means of attempting to coerce her to do so through intrusive and intimidating physical conduct. Consequently, the Appellate Court correctly ruled that the respondent has stated a cause of action for the intentional infliction of severe emotional distress.

II. The petition for a writ of certiorari should be denied since the decision below is in full accord both with this Court's prior ruling with respect to public figures and public officials in *Hustler Magazine v. Falwell,* and with the subsequent rulings of the Eighth and Ninth Circuit Courts of Appeals with respect to private figures, establishing only that an expression of opinion can proscribe a cause of action for intentional infliction of severe emotional distress when the gravamen of the complaint is defamation (i.e., an alleged injurious false statement of fact).

Petitioner argues that the Appellate Court of Illinois, Third District, has mistakenly allowed in its opinion the mere labeling of a cause of action as intentional infliction of severe emotional distress to circumvent the First Amendment protection afforded petitioner against respondent's libel claim. (Pet. 9) However, the Appellate Court made no such mistake since, whereas the gravamen of the dismissed libel claim was an alleged injurious false statement of fact which was adjudged to constitute protected opinion, the gravamen of the emotional distress count is non-speech conduct.

The underlying rationale for petitioner's aforesaid argument is that if a libel claim is unsuccessful because the alleged injurious false statement of fact is adjudged to constitute an expression of opinion protected by the First Amendment, then one should not be able to effectuate an "end-run" around the First Amendment by merely relabeling the same cause of action as intentional infliction of severe emotional distress. Indeed, some courts have held that an emotional distress claim based on the same acts as an unsuccessful libel claim cannot survive as an independent cause of action. See e.g., *Ault v. Hustler Magazine,* 860 F.2d 877, 880 fn 1 (9th Cir. 1988), *cert. denied,* March 20, 1989. Other courts have not been so swayed. See e.g, *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265 (3d Cir. 1979) (en banc).

Nevertheless, the aforesaid rationale was a generating force behind this Court's ruling in *Hustler Magazine v. Falwell,* 485 U.S. ____, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), which applied only to public officials and public figures. Reverend Jerry Falwell's defamation claim based on the infamous parody published by Hustler Magazine failed because the jury specifically found that the parody could not reasonably be understood as describing actual facts or events. However, based solely on the same parody, the jury ruled in Falwell's favor on the emotional distress claim. On appeal, the Fourth Circuit Court of Appeals affirmed the judgment against Hustler Magazine et al. *Id.,* 99 L.Ed.2d at 47-48.

In reversing the Fourth Circuit's decision, this Court held in *Hustler Magazine* that a public figure such as Falwell could not recover for emotional distress in such a situation unless he could prove that the publication contained a false statement of fact which was made with actual malice (i.e. with knowledge that the statement was false or with reckless disregard as to whether or not it was true). *Id.* at 52. This, of course, is the same standard that Falwell had not been able to meet with his defamation claim. Thus, the attempted end-run around the First Amendment was prevented in that limited context.

Therefore, this Court's decision in *Hustler Magazine* stands for the proposition that, with respect to public figures and public officials, there is a First Amendment opinion privilege from liability for intentional infliction of severe emotional distress when the gravamen of the distress claim is defamation. See *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893-94 (9th Cir. 1988) *cert. denied,* March 20, 1989. See also *Dworkin v. Hustler Magazine,* 867 F.2d 1188, 1192-93 (9th Cir. 1989). The balance struck in *Hustler Magazine* by this Court between First Amendment issues and other governmental interests may well have been influenced by the unique characteristics attendant to public figures and public officials, such as assumption of risk and counter-speech. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974). Thus, the predilection of this Court with respect to the proposition of extending the *Hustler Magazine* ruling to private figures is unknown.

Recently, in the aftermath of this Court's decision in *Hustler Magazine,* both the Eighth and Ninth Circuit Courts of Appeals have extended this holding to apply to private figures. See *Ault v. Hustler Magazine,* 860 F.2d at 880-81; *Deupree v. Iliff,* 860 F.2d 300, 304-305 (8th Cir. 1988). In both of these cases, the gravamen of the cause of action for emotional distress was defamation, (i.e., an alleged injurious false statement of fact), the respective complaints contained separate counts for both emotional distress and defamation, and both claims were based on the same acts. See *Ault,* 860 F.2d at 879-81; *Deupree,* 860 F.2d at 301. Thus, since the alleged injurious false statements involved were adjudged to constitute privileged opinion, both the defamation and emotional distress claims were unsuccessful in the two cases.

Therefore, even if it were to be decided that this Court's ruling in *Hustler Magazine v. Falwell* has been properly extended by these courts to apply to private figures, such a determination would not be germane to this proceeding. For, although the respondent is indeed a private figure, the Appellate Court of Ill-

inois, Third District, painstakingly made clear in its opinion with respect to this proceeding that the gravamen of the emotional distress claim is non-speech conduct. (Pet. A-11, A-12, A-14)

Thus, the decision below is in full accord with the teachings of this Court in *Hustler Magazine v. Falwell,* as well as the subsequent extension of its holding by both the Eighth and Ninth Circuit Courts of Appeals. Expressions of opinion can proscribe a cause of action for intentional infliction of severe emotional distress when the gravamen of the complaint is defamation (i.e., an alleged injurious false statement of fact). However, since the gravamen of the emotional distress count in this case is non-speech conduct, there is no constitutional question presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 30, 1989

APPENDIX

APPENDIX

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT

Roger K. Johnson, Clerk
815 434-5050

1004 Columbus Street
Ottawa, Illinois 51350

Be it Remembered, That, to wit: On the 20th day of September, 1988, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-87-0598

Margaret Van Duyn,
Appellant,

vs.

Gerald T. Smith,
Appellee.

APPEAL FROM:
Peoria County
Hon. Stephen J. Covey
86 L 130

Now on this day this cause coming on for hearing upon the petition for rehearing filed by Harry M. Williams & Daniel J. Smith, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

/s/ Roger Johnson
Clerk of the Appellate Court